

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELIX WADE,

Defendant.

NO. CR-06-6020-LRS

**ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL**

The Defendant has been convicted of Possession of a Firearm by A Prohibited Person, in violation of 18 U.S.C. § 922(g)(1). This matter comes before the Court on Defendant's Motion for New Trial (Ct. Rec. 83). Pursuant to Fed.R.Crim.P. Rule 33, the Court considered the motion. The motion was timely filed and no oral argument was requested. After consideration of the written record, the testimony of the witnesses, and argument by counsel, the Court issues this order denying Defendant's motion.

I. Defendant's Motion for New Trial

"A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal. *United States v. Alston*, 974 F.2d 1206, 1211 (9th

1 Cir.1992). "The court is not obliged to view the evidence in the
2 light most favorable to the verdict, and it is free to weigh the
3 evidence and evaluate for itself the credibility of the witnesses."
4 *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000).
5 Thus, "[i]f the court concludes that, despite the abstract sufficiency
6 of the evidence to sustain the verdict, the evidence preponderates
7 sufficiently heavily against the verdict that a serious miscarriage of
8 justice may have occurred, it may set aside the verdict, grant a new
9 trial, and submit the issues for determination by another jury."
10 *Kellington*, 217 F.3d at 1097 (quoting *United States v. Lincoln*, 630
11 F.2d 1313, 1319 (8th Cir. 1980)).
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13 The Court concludes that the evidence *does not* preponderate
14 sufficiently heavily against the verdict to suggest a serious
15 miscarriage of justice may have occurred. The Defendant has cited the
16 following allegations of error which he claims would warrant the grant
17 of a new trial:

18 **1. Prosecutorial Misconduct**

19 Defendant argues he is entitled to a new trial because of
20 prosecutorial misconduct. More specifically, Defendant states that the
21 United States Attorney's comments to the jury during closing argument
22 "played exclusively to the passions of the jury when he argued they
23 would have to find Officer Aparcio lied in order to find the defendant
24 Not Guilty." Ct. Rec. 84 at 1. In essence, Defendant argues that the
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1 prosecutor improperly vouched for or attempted to bolster the
2 testimony of a government witness in arguments to the jury.

3 A prosecutor may neither vouch for nor bolster the testimony of a
4 government witness in arguments to the jury. *United States v.*
5 *Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) "Vouching occurs when the
6 prosecutor indicates a personal belief in the credibility or honesty
7 of a witness; bolstering is an implication by the government that the
8 testimony of a witness is corroborated by evidence known to the
9 government but not known to the jury." *U.S. v. Sanchez*, 118 F.3d 192,
10 198 (4th Cir. 1997).

11 The Court finds that United States Attorney's closing argument,
12 presenting a hypothetical that "Let's say Officer Aparicio is out to
13 get this defendant, he's going to make up a story, he's going to lie
14 to you to get this defendant" did not improperly vouch for witness's
15 testimony, as it contained no statement regarding the prosecutor's
16 personal beliefs. This statement does not fit the definition of
17 either vouching or bolstering. It cannot be vouching, since the United
18 States Attorney made no statement about his personal belief in the
19 truth of the statement. The United States Attorney stated only that,
20 given defense's inference that Officer Aparicio was out to get this
21 defendant, he argued that it would have been more in the Officer's
22 interest to state that defendant possessed a firearm. Likewise, it
23 cannot be considered bolstering, as it does not refer to evidence not
24 presented to the jury.
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1 To successfully move for a new trial based on prosecutorial
2 misconduct, a defendant must show that it is "more probable than not
3 that the [prosecutorial] misconduct materially affected the verdict."
4 *United States v. Hinton*, 31 F.3d 817, 824 (9th Cir.1994) (citing to
5 *United States v. Christophe*, 833 F.2d 1296, 1301 (9th Cir.1987)).
6 Reversal will only be necessary if the alleged prosecutorial
7 misconduct actually deprived the defendant of a fair trial. *United*
8 *States v. Yarbrough*, 852 F.2d 1522, 1539 (9th Cir.1988), cert. denied,
9 488 U.S. 866, 109 S.Ct. 171, 102 L.Ed.2d 140 (1988). The prosecutor's
10 alleged misconduct must be evaluated in the context of the entire
11 trial. *Id.* [Emphasis added.]
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13 It has long been recognized that,

14 [t]he United States Attorney is the representative not
15 of an ordinary party to a controversy, but of a
16 sovereignty whose obligation to govern impartially is
17 as compelling as its obligation to govern at all; and
18 whose interest, therefore, in a criminal prosecution is
19 not that it shall win a case, but that justice shall be
20 done. As such, he is in a peculiar and very definite
21 sense the servant of the law, the twofold aim of which
22 is that guilt shall not escape or innocence suffer. He
23 may prosecute with earnestness and vigor-indeed, he
24 should do so. But, while he may strike hard blows, he
25 is not at liberty to strike foul ones. It is as much
26 his duty to refrain from improper methods calculated to
produce a wrongful conviction as it is to use every
legitimate means to bring about a just one...

Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935)(per
Sutherland, J.).

24 Even if the prosecutor's closing used the word 'lie,' "the
25 touchstone of due process analysis in cases of alleged prosecutorial
26 misconduct is the fairness of the trial, not the culpability of the

1 prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 947
2 (1982). A new trial based on prosecutorial misconduct is granted only
3 where the defendant shows that "the conduct more probably than not
4 materially affected the fairness of the trial." *United States v.*
5 *Atcheson*, 94 F.3d 1237, 1244 (9th Cir. 1996). That showing has not
6 been made here.

7 **2. Testimony by Officer Aparicio**

8 During cross-examination at trial, the Government's witness
9 Officer Aparicio was questioned about statements made by the Defendant
10 regarding the firearm. Officer Aparicio stated that the Defendant
11 denied throwing anything. On a follow-up question about statements
12 regarding the gun, Officer Aparicio stated that the Defendant stated
13 he would have to plead the Fifth. Defense counsel moved for a
14 mistrial based on the statement, and the Court addressed the issue
15 during a side bar. The Court subsequently denied Defendant's motion
16 for mistrial and the statement was stricken¹ and the jury was properly
17 instructed by the Court.
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19 Defendant's Motion for New Trial also alleges that a new trial
20 should be granted based on the testimony of Officer Aparicio that the
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22 ¹In a footnote in the Order Denying Defendant's Motion to Suppress
23 entered on July 6, 2006 following an evidentiary hearing, the Court
24 suppressed Defendant's statement regarding his invocation of the 5th
25 Amendment, finding it would serve no legitimate purpose before the jury.
26 Ct. Rec. 61, at 2.

1 Defendant exercised his right to remain silent under the 5th Amendment
2 when asked about the firearm. See Ct. Rec. 84 at 3-4. Defendant
3 asserts that the Government may not intentionally make or solicit
4 comments concerning a Defendant's right to remain silent. It is not
5 clear what the Defendant believes the Government did in this regard
6 but his brief suggests the Government intentionally or accidentally
7 solicited comments from Officer Aparicio regarding Defendant's right
8 to invoke the 5th Amendment right.
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10 The Government responds that it did not illicit any testimony on
11 direct examination regarding post-arrest silence. Rather, the
12 Government argues, it offered statements that were made by the
13 Defendant after being advised and subsequently waiving his *Miranda*
14 rights.

15 The Court finds that the challenged statement of Officer
16 Aparicio, made under a rigorous cross-examination, was accidental and
17 undeliberate. Considering the context in which it occurred, the
18 likely curative effect of the judge's instructions to the jury, and
19 the strength of the evidence against the Defendant, any alleged error
20 committed by the court was harmless.

21 Under Federal Rule of Criminal Procedure 33, the district court
22 "may grant a new trial to [the] defendant if required in the interest
23 of justice." Fed.R.Crim.Pro. 33. To satisfy this standard, the
24 defendant must show that: (1) newly discovered evidence exists, (2)
25 the fact that it is newly discovered is not due to a lack of diligence
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1 on the defendant's part, (3) the evidence is material to the issues at
2 trial, (4) the evidence is not cumulative or merely impeaching, and
3 (5) the evidence indicates that a new trial would probably result in
4 an acquittal. See *United States v. Kulczyk*, 931 F.2d 542, 548 (9th
5 Cir.1991). The burden of demonstrating prejudicial error, on motion
6 for new trial, is on defendant. 3 C. Wright, *Federal Practice and*
7 *Procedure: Criminal* 2d, § 551 (1982). "Courts disfavor new trials, and
8 exercise great caution in granting them." *United States v. Troutman*,
9 814 F.2d 1428, 1455 (10th Cir.1987) (citations omitted). Because
10 motions for new trial are not regarded with favor, such motions are
11 granted only with great caution, being addressed to the sound
12 discretion of the court. *United States v. Page*, 828 F.2d 1476 (10th
13 Cir.), *cert. denied*, 484 U.S. 989, 108 S.Ct. 510, 98 L.Ed.2d 508
14 (1987)
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16 Defendant fails to meet the five-part test established by this
17 court. Officer Aparicio's comment, during a vigorous cross-
18 examination by defense counsel, that Defendant exercised his right to
19 remain silent under the 5th Amendment, is not newly discovered evidence
20 for purposes of a motion for new trial. Moreover, the jury was
21 specifically instructed to ignore Officer Aparicio's comment when
22 objected to by counsel. Accordingly, the Court denies the Defendant's
23 request for new trial on this claim. Moreover, in the view of the
24 court, the jury conscientiously and carefully performed its office.
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1 The court finds that there was substantial competent evidence to
2 support the verdict of guilty.

3 **II. Conclusion**

4 In this case, the Court is unconvinced the prosecutor's use of
5 the term "lie" in the actual context of the closing statement was so
6 prejudicial as to require a mistrial. Additionally, the Court
7 instructed the jury on the occasion to disregard the comment of
8 Officer Aparicio on cross-examination and to draw no inference from
9 it. Because his statement was not sufficiently prejudicial to
10 demonstrate the futility of the court's curative directive, the
11 undersigned believes any alleged error was harmless. In sum, while
12 Officer Aparacio's statement at issue was evidence the Court had
13 suppressed, it was seemingly unintentional, extracted by defense
14 counsel in cross-examination, and any prejudicial effect was
15 ameliorated by curative instructions and competent evidence of
16 Defendant's guilt.
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18 **Accordingly, IT IS HEREBY ORDERED:**

19 Defendant's Motion for New Trial (Ct. Rec. 83) is **DENIED**.

20 The District Court Executive is directed to enter this Order and
21 forward copies of this Order to counsel.
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23 **DATED** this 1st day of September, 2006.

24 s/Lonny R. Suko

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LONNY R. SUKO
26 United States District Judge